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Supreme Court of the United States.

HENRY MUHLKER,
Original Plaintiff,
and
Plaintiff in Error,

against

THE NEW YORK AND HARLEM RAILROAD COMPANY, AND THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Original Defendants,
and
Defendants in Error.

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Memorandum in Opposition to Motion.

The application for leave to file an additional brief should be denied for the following reasons:

I.

The argument of this case was concluded on December 13, 1904. No suggestion was then made, on the part of either court or counsel, that further briefs were desirable. Since then 21 days have elapsed. It may be that the consideration of the case by the court has been closed. After this lapse of time it would seem to be too late to re-open the argument.

II.

A copy of our brief was served upon the opposing counsel on November 23, 1904. Their brief was served upon us on December 3, 1904. In preparing

their brief, they had ours before them, and were thus enabled to reply to it. We have had no opportunity to answer them, save upon the oral argument, when the position of the parties was equal. Thus they have had in reply two chances to our one. They now seek still another chance. We respectfully submit that it should not be granted.

III.

Since the argument of this case, the opposing counsel have discovered that the ground of the decision of the Court of Appeals was totally different from what that court says it was. The learned counsel now claim that the real ground of the decision was a determination that the plaintiff's easements in Fourth Avenue had not been taken or trespassed upon by the defendants, although the trial judge found that they had been. Neither in the opinion nor in the judgment of the Court of Appeals is there a single syllable supporting this theory. On the contrary, the opinion (Record, p. 170), speaks in two places of the "destruction" of these easements by the erection of the viaduct. In the face of this plain statement that the plaintiff's property rights have been *destroyed*, it is purely fanciful to argue that what the court really meant, was, that there was no evidence to show that these property rights had been *trespassed upon*.

The Court of Appeals has nothing to do with evidence, except to answer the sole question whether there is *any* evidence to support a given finding.

Amherst College *v.* Ritch, 151 N. Y. 282, 320.

Ostrom *v.* Greene, 161 N. Y. 353, 357.

If there is *any* evidence, the discussion in that court is terminated.

Was there *any* evidence to support the seventh finding?

In the State of New York, if an abutting owner has easements in the street, and if there is an elevated railroad in front of his premises, this constitutes a trespass upon and a taking of his property (see cases on p. 45 of our brief).

Hence to support the seventh finding, it is only necessary to show (1) that the plaintiff has easements in and over the strip of land constituting Fourth Avenue, and (2) that the defendant operates an elevated railroad in said avenue. The latter proposition is undisputed. The former is equally undisputed. The existence of the easements was found by the court (Record, p. 23), and we do not understand that the finding is questioned. The easements came into being through the dedication and acceptance of Fourth Avenue, and through the filing of maps representing said avenue and the making of conveyances with reference to those maps. These acts all antedated the very existence of the defendants. By these acts the easements were created and attached as appurtenances to the plaintiff's lot. This lot was the dominant tenement and the strip of land constituting Fourth Avenue, was the servient tenement. The easements have never been lost. They still exist, except to the extent that they have been "destroyed" by the viaduct in question.

Thus it appears that both the elements constituting the seventh finding were supported by evidence which was uncontradicted. How, then, could the Court of Appeals have held that there was not *any* evidence to support this finding?

The motion should be denied.

Respectfully submitted,

J. C. BUSHBY,
L. M. BERKELEY,
Attorneys for Plaintiff in Error.